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Right of peoples to self-determination

Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly, in accordance with General Assembly resolution 52/112 of 12 December 1997, the report prepared by Mr. Enrique Bernales Ballesteros (Peru), Special Rapporteur on the question of the use of mercenaries.

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Annex

Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, submitted by the Special Rapporteur of the Commission on Human Rights

I. Introduction

1. During its fifty-second session, the General Assembly adopted resolution 52/112 of 12 December 1997 which, *inter alia*, reaffirmed that the use of mercenaries and their recruitment, financing and training are causes for grave concern to all States and violate the purposes and principles enshrined in the Charter of the United Nations. The General Assembly urged all States to take the necessary steps and to exercise the utmost vigilance against the menace posed by the activities of mercenaries and to take appropriate legislative measures to ensure that their territories and other territories under their control, as well as their nationals, are not used for the recruitment, assembly, financing, training and transit of mercenaries for the planning of activities designed to destabilize or overthrow the Government or threaten the territorial integrity and political unity of sovereign States or to promote secession or to fight the national liberation movements struggling against colonial or other forms of alien domination or occupation. The Assembly called upon all States that had not yet done so to consider taking the necessary action to sign or to ratify the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, and urged them to cooperate fully with the Special Rapporteur in the fulfilment of his mandate.

2. The General Assembly requested the Office of the United Nations High Commissioner for Human Rights, as a matter of priority, to publicize the adverse effects of mercenary activities on the right to self-determination and, when requested and where necessary, to render advisory services to States that are affected by the activities of mercenaries; and requested the Special Rapporteur to report his findings on the use of mercenaries to undermine the right of peoples to self-determination, with specific recommendations, to the General Assembly at its fifty-third session.

3. For its part, the Commission on Human Rights, at its fifty-fourth session, adopted resolution 1998/6 of 27 March 1998 in which, *inter alia*, it decided to extend the mandate of the Special Rapporteur for three years.

4. Accordingly, and pursuant to the above-mentioned resolution 52/112, the Special Rapporteur has the honour to submit this report to the General Assembly for consideration at its fifty-third session.

II. Activities of the Special Rapporteur

A. Implementation of the programme of activities

5. The Special Rapporteur submitted his report (E/CN.4/1998/31 and Add.1) to the Commission on Human Rights on 18 March 1998. While in Geneva, the Special Rapporteur had consultations with representatives of various States and held meetings with members of non-governmental organizations. He also held coordination meetings with the Activities and Programmes Branch of the Office of the United Nations High Commissioner for Human Rights.

6. The Special Rapporteur returned to Geneva on two occasions, from 26 to 29 May 1998 and from 17 to 21 August 1998, to hold various meetings, to participate in the fifth meeting of special rapporteurs and special representatives, independent experts and chairmen of working groups of the Commission on Human Rights, and to draft this report.

B. Correspondence

7. Pursuant to General Assembly resolution 52/112 of 12 December 1997 and Commission on Human Rights resolution 1998/6 of 27 March 1998, the Special Rapporteur sent a communication on 6 July 1998 to all States Members of the Organization requesting the following:

(a) Information on the possible existence of any recent mercenary activities (recruitment, financing, training, assembly, transit or use of mercenaries);

(b) Information available to their Government on participation by nationals of their country as mercenaries in committing acts against the sovereignty of other States,

against the exercise of the right of other peoples to self-determination and in human rights violations;

(c) Information on the possible existence of mercenary activities in the territory of another State from which actions are carried out that affect or potentially affect the sovereignty of their country, the exercise of the right of their people to self-determination and its enjoyment of human rights;

(d) Information on the participation of mercenaries in committing internationally wrongful acts such as terrorist attacks, forming and supporting death squads, trafficking in and abduction of persons, drug trafficking, the arms traffic and contraband;

(e) Information on domestic legislation currently in force and on international treaties to which their country is a party, outlawing mercenary activities and the use of mercenaries, together with observations on their Government's position regarding the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, adopted by the General Assembly on 4 December 1989;

(f) Suggestions which, in their Government's view, might be of use in enhancing the international treatment of the topic of prohibiting the use of mercenaries;

(g) Information and views on international security service and military advice and training companies offering their services to Governments in order to intervene in internal armed conflicts with the assistance of mercenarized military professionals, for the purpose of improving the military effectiveness of government forces, in exchange for cash benefits and shares in the investments and economic ventures of the country in which they operate.

8. In response to this request by the Special Rapporteur, the Permanent Mission of the Syrian Arab Republic to the United Nations Office at Geneva submitted extensive information in a note verbale dated 10 July 1998. In one of its substantive paragraphs, the text of the above-mentioned communication reads as follows:

> "We maintain that the notion of mercenaries is based on and connected with a desire to violate peoples' rights and occupy and exploit their land. It is therefore a means of colonizing and occupying territory and opposing peoples' wishes. The remedy is to start by tackling the basis that resulted in the existence of mercenaries."

9. By note verbale dated 23 July 1998, the Permanent Mission of Uruguay to the United Nations Office at Geneva conveyed the following information to the Special Rapporteur:

> "(a) The Ministry of Foreign Affairs of Uruguay has communicated that it has found no information to suggest that mercenary activities are being carried out in Uruguay (recruitment, financing, training, assembly, transit or use of mercenaries);
>
> "(b) Nor is there any information to suggest the participation of Uruguayan citizens in such activities abroad, or any information on activities carried out from the territory of other States which affect Uruguay's sovereignty;
>
> "(c) It also has no information on the activities of mercenary groups at the international level".

10. The Permanent Mission of Ecuador to the United Nations Office at Geneva, by note verbale dated 30 July 1998, informed the Special Rapporteur, *inter alia*, as follows:

> "The files of the National Intelligence Service of the National Police have been found to contain no information on mercenaries operating in the country, and there is no evidence that Ecuadorian nationals are engaged in mercenary activities in other States.
>
> "Moreover, mercenary activities which take the form of terrorist attacks, genocide, trafficking in and abduction of persons, drug trafficking, the arms traffic and smuggling are expressly prohibited by the Ecuadorian Penal Code, the National Security Act and the Act on Narcotic Drugs and Psychotropic Substances".

11. Mr. Amílcar Santamaría, Deputy Minister for Foreign Affairs of Honduras, in a letter dated 3 August 1998, also gave a detailed response to the Special Rapporteur's letter. In one of its substantive paragraphs, the letter states as follows:

> "Regarding any suggestions which we might have for enhancing the international treatment of the topic of the prohibition of the use of mercenaries, we wish to suggest the following:
>
> "(a) Maintain close contact on the subject with national authorities, especially the authorities of countries that are close to areas where internal and international armed conflicts are taking place;
>
> "(b) Promote through established mechanisms, the updating of periodic reports on armies' registers of conventional arms;

"(c) Maintain close contact on the subject with the International Criminal Police Organization (INTERPOL); and

"(d) Promote, through the competent international organizations, the incorporation into national legislation of effective preventive measures and severe penalties against those who engage in these wrongful acts".

12. Mr. Miroslav Milosević, Chargé d'affaires a.i. of the Permanent Mission of the Federal Republic of Yugoslavia (Serbia and Montenegro) to the United Nations Office at Geneva, sent the Special Rapporteur a letter dated 4 August 1998 containing serious charges concerning what he characterizes as terrorist actions committed by mercenaries in the provinces of Kosovo and Metohija since early 1998. The Special Rapporteur is studying these charges and will transmit them to the Governments accused of permitting such mercenary activities.

13. By note verbale dated 7 August 1998, the Permanent Mission of Portugal to the United Nations Office at Geneva responded to the Special Rapporteur's request for information and suggestions. The communication provides detailed information on the provisions of Portugal's Constitution and domestic legislation applicable to the prohibition of mercenary activities, particularly article 7 of the Constitution and articles 237 and 238 of the Penal Code, and states as follows:

"Portugal's legislation prohibits the use of mercenaries and upholds the principle of self-determination and the right of peoples to self-determination.

"Its involvement in the question of East Timor exemplifies this position.

"It therefore condemns the use of mercenaries and associates it with the violation of human rights, especially the right of peoples to self-determination".

14. Mr. Bertil Roth, Director of International Law and Human Rights in the Ministry of Foreign Affairs of Sweden, in a letter dated 6 August 1998, informed the Special Rapporteur that, although Sweden's domestic legislation does not use the concept of "mercenaries", chapter 19, section 12, of the Penal Code could be used to punish the recruitment of mercenaries. Chapter 22, section 6, of the Swedish Penal Code can also be applied to punish crimes against international law. With regard to the position of the Government of Sweden on the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, the letter states as follows:

"Throughout the work on the drafting of the Convention, Sweden supported the work of the Ad Hoc Committee towards a universally acceptable convention and reaffirmed its view that Sweden strongly condemns the activities of mercenaries. However, Sweden has not acceded to the Convention since such an accession would require an alteration or amendment of Swedish legislation. Sweden has on several occasions expressed the view that mercenary activities might be contrary to fundamental principles of international law if, for example, they involve interference in the internal affairs of a State at the instigation or with the assistance of another State. In other cases, however, while the crimes of individuals acting on their own behalf were clearly reprehensible, the activities in question could not be imputed to States or regarded as violations of international law".

15. By letter dated 11 August 1998, the Director of Human Rights in the Ministry of Foreign Affairs of Ireland, Barbara Cullinane, referred to article 15.6 of the Constitution of the Republic of Ireland, section 312 of the Defence Act of 1954 and sections 1 and 2 of the Prisoners of War and Enemy Aliens Act of 1956 that could be applicable to the suppression of mercenary activities. With respect to the applicable international instruments she adds:

"Ireland has not yet signed the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989, and there are no immediate plans to do so. It is expected that Ireland will shortly ratify Protocol I Additional to the Geneva Conventions of 12 August 1949, article 47 of which specifically deals with mercenaries".

16. By letter dated 8 June 1998, the Special Rapporteur requested authorization from the Government of the United Kingdom of Great Britain and Northern Ireland to pay an official visit to that country to continue his study of the question of private security service and military advice and training companies which operate on the international market using mercenaries. In reply, the following letter was received from Mr. Tony Lloyd, Minister for Human Rights and United Nations Affairs of the Foreign and Commonwealth Office, dated 8 July 1998:

"We should be delighted to welcome you here later this year. The British Government is currently looking closely at the activities of private military companies operating from the United Kingdom. We would welcome the opportunity to exchange views on this, based on your extensive experience in other countries.

"I suggest the best timing for a visit might be in the autumn, possibly in September/October. Perhaps your staff would liaise with the Permanent Mission of the United Kingdom in Geneva on precise timings and practical arrangements".

C. Correspondence on mercenary activities against Cuba

17. In previous reports, the Special Rapporteur has reported on and reproduced communications from the Government of Cuba making reference to mercenary attacks against that country. In his most recent report to the Commission on Human Rights (E/CN.4/1998/31, para. 20), the Special Rapporteur reproduced a letter from the Minister for Foreign Affairs of Cuba, dated 1 October 1997, concerning the bomb attacks by Salvadoran national Raúl Ernesto Cruz Léon against hotels and tourist facilities in Havana. The Special Rapporteur also requested information from the Government of the United States of America on any investigations which might be under way in that country, particularly in the State of Florida, to establish any responsibility which groups opposed to the Government of Cuba might bear for crimes against that country. The letter in reply from the Permanent Representative of the United States of America to the United Nations Office at Geneva, dated 13 January 1998, was issued as an addendum to the Special Rapporteur's report (E/CN.4/1998/31/Add.1).

18. Subsequently, the Special Rapporteur received the following letter from Mr. Carlos Amat Forés, Permanent Representative of Cuba to the United Nations Office at Geneva, dated 3 August 1998:

"I consider it relevant to bring to your attention a copy of the articles published recently in *The New York Times* of 12 and 13 July, based on an interview with Luis Posada Carriles, a terrorist and mercenary of Cuban origin, which caused a stir in the United States and international press and public opinion.

"In his statements to the United States newspaper, Posada Carriles, whose long list of activities against the Cuban people includes, in addition to his participation in acts of sabotage, assassination plots and other similar actions in the dirty war against Cuba, organizing the sabotage of the Cubana aircraft in Barbados which took the lives of 73 innocent people, including the teenaged members of our country's junior fencing team, explicitly acknowledged, with utter cynicism and complete self-assurance, his participation in these terrorist actions and the financing and support received from the Cuban American National Foundation, and explained the obvious apathy of United States officials in investigating his terrorist activities against Cuba by what he referred to as his long-standing ties with United States intelligence and law enforcement agencies.

"In these statements, Luis Posada Carriles also said that he had organized a campaign of bombings last year in hotels, restaurants and discotheques in Cuba, in which an Italian tourist was killed. These bombings, as the Special Rapporteur will recall, were reported in detail by the Cuban Government in its letter dated 1 October 1997 and mentioned in the Special Rapporteur's report to the Commission on Human Rights at its fifty-fourth session".

III. Mercenary activities in Africa

A. General aspects

19. Since it began in 1988, this mandate has been linked to the defence of the right of self-determination of the peoples of Africa who, set up as independent States after decolonization, had to contend with the illegal actions of mercenaries who, serving the interests of third States or economic groups, devoted themselves to sabotaging their political and economic stability. The reports submitted by the Special Rapporteur have referred repeatedly to the intervention of mercenary forces which became involved in armed conflicts, inter-ethnic confrontations and power struggles, at the same time perpetrating ferocious, highly destructive acts of violence. Mercenaries have been involved in the majority of cases where violence has affected the right of African peoples to peace, security and political stability.

20. The post-cold war period, which offered the whole world the possibility of achieving international relations based on peace rather than on the speculative tension of hypothetical armed conflicts, has not really fulfilled its promise in Africa. On the contrary, several States have seen their sovereignty and stability affected by situations of violence and intolerance which rapidly led to armed conflicts with regional repercussions. The cause of these conflicts is complex, and while one ever-present factor is the lack of inter-ethnic integration, it is undeniable that internal tensions have also been kindled from outside Africa, whether in the interest of maintaining zones of influence or hegemony or out of a desire to control the continent's valuable natural

resources. In this context, having recourse to mercenaries, whether through individual recruitment or through the more sophisticated method of contracting with private military advice and training and security firms, has been one of the methods used to undermine the self-determination of these peoples.

21. Systematic observation of those African countries which have suffered the presence of mercenaries has made it possible to develop a profile of this phenomenon, the main characteristics of which are the following:

(a) Political instability which has weakened and delayed the consolidation of the State and its authority. What we see are successive, almost endemic, crises where the power struggle among factions reflects problems of resistance and lack of comprehension of the rules of democracy on the part of political leaders who do not hesitate to engage in militarization and create armed groups around themselves;

(b) Lack of institutionalization of the armed forces, which as a result assume in practice the role of deliberative bodies, with the ability to arbitrate and settle internal political disputes by military means;

(c) During apartheid, the development of a segregationist policy which affected many countries of southern Africa, exposing them to criminal acts and to attacks by mercenary battalions coming from the very heart of the racist segregationist regime;

(d) The existence of many internal armed conflicts, some of them attributable to ethnic mistrust and resistance, which extend to the regional level and in which the warring parties resort to the hiring of mercenaries to boost their military potential;

(e) The lucrative business which the incitement of hatred and political, religious, ethnic or any other kind of rivalry represents for organizations which hire and supply mercenaries and for arms dealers and which fuels the prolongation of armed conflicts;

(f) The insecurity of rulers, who have not hesitated to organize militias or military apparatus for their personal protection in which the training and visible presence of foreign mercenaries have exacerbated rivalries and fuelled armed confrontations, especially when members of these paramilitary bodyguards are recruited from the ethnic group of the person in power. The response of other political leaders will then be to recruit their own armed militias. This atmosphere of mistrust and militarization is conducive to the presence of mercenaries;

(g) Poverty, insecurity and lack of prospects predispose some young people to violent behaviour, giving rise to armed gangs which terrorize the population. Of course, this development would seem to have more to do with the increasing problem of vandalism and ordinary crime, but it should not be forgotten that a number of young people, driven by hunger and unemployment and skilled in the handling of weapons will, by becoming mercenaries, find a lucrative occupation very similar to that of the bogus heroes depicted in some television series;

(h) The presence, in the area, of transnational conglomerates pursuing their own agenda, which is at the least different from, if not contrary to, that of the former colonial Powers. The way in which these transnationals exploit natural and energy resources is open to criticism. Their intervention in internal affairs and their encouragement of internal conflicts because this is what best serves their interests sometimes involve the presence of mercenaries, either to protect their facilities in territories which literally are no longer under the authority of States because conflicts have neutralized the State's ability to exercise that authority, or to give military backing to the faction committed to the interests of the multinationals;

(i) Lastly, there is the matter of modern private security companies, which provide all kinds of services, economic advice and sophisticated military training but behind which lurk former professional soldiers and mercenaries offering themselves as a solution, in exchange for large sums of money, to countries experiencing instability and armed conflict and hence unable to develop their vast natural resources. Such companies are today the biggest and most sophisticated threat to the peace, sovereignty and self-determination of the peoples of many countries.

B. The case of Sierra Leone

22. This country was affected by an internal armed conflict in which there was mercenary intervention. Peace appeared to have been achieved when, in November 1996, an agreement was signed between President Alhadji Ahmed Tejan Kabbah and the rebel chief, Foday Sankoh. The Governments of Burkina Faso, Côte d'Ivoire, Ghana, Guinea, Nigeria and Togo contributed to the peace effort, but within a matter of months (May 1997), a further *coup d'état* took place, led by Commander Johnny Paul Kosoma who overthrew President Tejan Kabbah and formed a revolutionary council. Violence returned to the country, forcing no less than half a million people to flee and the

Governments of the region to refuse to recognize the Government established by the coup.

23. The lower ranks of the armed forces participated in the 25 May 1997 *coup d'état*. The overthrow of President Tejan Kabbah and the seizure of power by a revolutionary council, which immediately demanded that Nigeria return Foday Sankoh, put an end to a fragile peace and caused a resumption of violence. Various foreign companies operating diamond, titanium, bauxite and gold mines left the country or were forced to suspend their operations. The Governments of the region not only condemned the use of force but also isolated the rebels and demanded the return of the democratic Government of President Tejan Kabbah, which finally took place in April 1998, after bloody fighting in which the Military Observer Group of the Economic Community of West African States (ECOMOG) took part.

24. The Special Rapporteur has received information that, from his exile in Guinea, President Tejan Kabbah allegedly sought help from the company Sandline International in providing military backing and assisting his return to power. The Special Rapporteur has already mentioned this company in previous reports (see, for example, E/CN.4/1998/31, paras. 93 to 99), mainly because of the contract which it entered into in 1997 with the Government of Papua New Guinea, headed by Sir Julius Chan, to fight the rebels of the Revolutionary Army of the Island of Bougainville. That Government was ultimately overthrown and the company expelled from the country. Mining and financial companies with interests and assets in Sierra Leone allegedly supported and even partially funded the hiring of Sandline International.

25. Sandline International acceded to the request and sent a document outlining its ideas for the operations to be carried out, as well as tactical and strategic plans. This was followed by the export of military equipment and helicopters, despite the embargo ordered by the United Nations in 1997. Later, the company sent military experts to the country to provide tactical and operational assistance services which are allegedly still ongoing in Sierra Leone.

26. The Special Rapporteur notes that Sandline International is not the first security services and military advice and assistance company to operate in the country. In earlier reports to the General Assembly and the Commission on Human Rights, he referred to the internal armed conflict and mentioned as an element of the crisis the presence of the private firm Executive Outcomes, registered in South Africa, which had intervened militarily in the previous conflict under a contract for the provision of services which brought it millions of United States dollars and other company benefits. It is well known that this company has had no qualms about recruiting mercenary elements when its participation has been sought in security matters, a factor that would undermine the internal stability of any country. The case of Sierra Leone confirms this, since despite the company's presence in the country for several months, the *coup d'état* of May 1997 could not be avoided.

27. Although President Tejan Kabbah has been restored to office and the rebel groups which committed grave human rights violations have been defeated, the presence in the country of this type of company must be kept under scrutiny. Some sources report that Sandline International remains in Sierra Leone and is in charge of eliminating resistance by the rebels of the Revolutionary United Front in the north and east of the country. While the rebels should be strongly condemned, since their military resistance could derail the peace efforts undertaken by the West African countries, ECOMOG, the Organization of African Unity (OAU) and the United Nations, which recently opened an office to work for peace and human rights in Sierra Leone (UNOMSIL), the involvement of mercenaries must also be condemned, even when they help to restore a constitutional regime.

28. In this context, the active commitment of the African countries, and support for that commitment from the United Nations, are essential if Sierra Leone is to achieve greater political stability and development opportunities. The events described should, however, also serve as a warning against false solutions, such as recourse to the companies mentioned in this section which, on leaving a country, leave behind them intact the structural problems faced by the people in question.

29. The right to life, to proper legal and political institutions, to security, peace and the maintenance of the rule of law and democracy are definitely not matters which can be entrusted to private military assistance and training companies. They do offer efficiency gains in the area of security, but they definitely cannot replace the bodies which are responsible for protecting life and security as inherent obligations of the State. In our view, this argument remains current and valid.

C. Presence of mercenaries in the Democratic Republic of the Congo

30. In previous reports, the Special Rapporteur referred to information received about the presence of mercenaries in the former Zaire who attempted to defend the Government of Mobutu Sésé Séko and most of whom decided to leave the

country after the fall of Kisangani. In order to verify this information, the Special Rapporteur wrote to the Government of the Democratic Republic of the Congo requesting accurate, verifiable information and asking whether any legal action had been brought against the mercenaries. Although some time has passed, no reply has been received.

31. The lack of information on the actual situation of foreign mercenaries in the country is regrettable, especially if some of them were captured when the Mobutu regime fell. It has been learned indirectly that most of them were in fact released on condition that they returned to their countries of origin. As events following several armed conflicts have shown, such a liberal attitude is dangerous. Mercenaries must be punished for their crimes and for potentially violating human rights and self-determination in the countries in which they interfered. Impunity is never a solution. It has in fact been seen that mercenaries who are treated as prisoners of war soon resume their criminal practices, in the same country or elsewhere.

32. The Special Rapporteur has been informed of the presence in the Democratic Republic of the Congo of the London-registered firm Defence Systems Limited, which is responsible for guarding various mines and petroleum installations, as well as several embassies in Kinshasa. The firm, which was established in 1981, is reported to have over 4,000 employees and to be operating in nearly 30 countries.

33. The situation in the Democratic Republic of the Congo has again deteriorated. At the time of drafting (August 1998), military forces, mostly of Banyamulenge and Tutsi origin, were fighting to overthrow President Kabila, accusing him of using the same anti-democratic methods as his predecessor. For his part, President Kabila is reported to have denounced a conspiracy against his regime involving neighbouring Rwanda and Uganda, among other States, and to have sought the military intervention of Angola and Zimbabwe. Whatever the outcome of the armed conflict, it is to be hoped that, this time, mercenaries will not be brought in to fight on any side and that a peaceful, democratic solution will finally be found which is based on respect for life, mutual understanding among all groups, self-determination of peoples, non-intervention in the internal affairs of States, and peace. The Special Rapporteur hopes that military operations will cease and that a peaceful process of political dialogue will begin in the country.

IV. Persistence and evolution of mercenary activities

34. It is an undeniable fact that the phenomenon of mercenarism and mercenary activities exists; it may recede when peace, political stability and respect for the democratic order are established, but it reappears when these conditions experience a crisis. Furthermore, changes in its operating methods, such as the use of private firms offering security services and military assistance on the international market, do not alter its intrinsic nature, they simply make it more sophisticated and also more dangerous.

35. Starting from the premise that mercenarism still exists and after systematically monitoring a number of situations where the presence of mercenaries has been detected and confirmed, the Special Rapporteur has identified a number of elements which, in his view, go to make up a definitive profile that may be useful for identifying mercenary activities whenever they arise.

A. Critical analysis of the current situation

36. The Special Rapporteur has observed that mercenarism tends to arise in situations of internal or international armed conflict. This is because the parties to a conflict have specific military needs which require the assistance and hiring of military professionals. Mercenaries, especially those hired to take part in combat activities and to train future members of battalions, columns or commando units, tend to be former soldiers or combatants and to be experienced in the use of sophisticated weaponry. Mercenary activities are not a thing of the past, they are still going on and they are a factor in violating human rights and undermining the self-determination of peoples or the stability of legitimate Governments. Armed conflicts, terrorism, arms trafficking, covert operations to protect the interests of a third Power which intervenes to harm one of the parties to an armed conflict, the inability of a Government to ensure security in its country, violence linked to extremist intolerance – all of these foster or create a demand for mercenaries.

37. The General Assembly, the Security Council, the Economic and Social Council and the Commission on Human Rights have repeatedly condemned mercenary activities. There is no legal framework which authorizes, permits or tolerates their existence in any form. Regardless of any legal vacuum or gap that may exist, mercenarism is an international wrongful act. Mercenary activity arises in

situations which violate the self-determination of peoples and the sovereignty of States. In engaging in such activities, mercenaries commit atrocious crimes and violate human rights. The fact that a Government hires mercenaries, or "specialized" firms providing mercenary services, to defend it and to strengthen its position in an armed conflict must not be invoked to claim that such acts are legal. A Government can legitimately act only within the corresponding constitutional framework and in accordance with the international treaties to which the State is a Party. Under no circumstances can it use its authority to carry out acts contrary to self-determination, to undermine the independence and sovereignty of the State or to allow actions which may seriously harm the lives and security of the population.

38. A variety of explanations are given for the use of mercenaries: military professionalism; combat experience; concealment of the identity of the real mastermind; greater possibilities of intervening without directly bearing the consequences; comparatively lower cost in terms both of money and of endangering the lives of one's own military personnel; and knowledge of strategic planning. The reality is that there are people who are prepared to become mercenaries and who ultimately do so because of the pay they receive for engaging in an unlawful activity in a country other than their own; their intervention is motivated directly by financial gain. This situation is compounded by the existence of modern business conglomerates which are becoming involved in security as an "industry" and which hire mercenaries for some of their activities.

39. Two circumstances must normally exist in order for mercenary activity to arise: first, there must be an organization, a State or a party to a conflict which, in order to carry out activities that are against the law and that breach the international obligations of non-interference in internal affairs, hires mercenaries to do the job; secondly, there must be recruiting organizations, companies and individuals who, in return for high pay, are prepared to serve as mercenaries.

40. The investigation of mercenary activities must be objective, encompass all those involved and attempt to determine the nature of the act, without accepting any formal legal limitations that may be invoked precisely to conceal the mercenary component. When there are accusations of acts committed by mercenaries, the real identity and nationality of the person must also be determined. The investigator must go through the files; rule out altruistic voluntary enlistment; compile information on recruitment and training centres for soldiers of fortune; follow the trail of covert operations; obtain reliable data on the pay and other benefits agreed upon; and detect the simultaneous use of other nationalities and passports. Lastly, when nationality is conferred on foreigners taking part in armed conflict, the length of time, circumstances and legal grounds which attest to the good faith and legitimacy of the new nationality must be established.

41. The question of mercenary activities has so many ramifications nowadays that we must look at the matter of nationality, which has until now been viewed as a differentiating factor and which is decisive for determining whether an act the impedes the enjoyment of human rights and the self-determination of a people can be characterized as a mercenary act. A foreign Power can in fact avail itself of nationals of the country which it proposes to attack in order to do serious harm to that country. In such cases, even through the nationals were hired and paid, international law as it now stands would not allow the act to be defined as mercenary. Nevertheless, the fact that existing international law is excessively rigid, inadequate, has gaps or its interpretation makes it too difficult to apply for the purpose of defining an act as mercenary does not make it right to invoke existing norms as permitting acts and conduct which are intrinsically mercenary.

42. Without obviating the need to clarify, amend and refine the norms of customary international law and international treaty law against mercenary activities, it should be established as a matter of principle that, in essence, the aim of such norms is to condemn mercenarism in the broad sense of buying and selling criminal services in order to undermine the enjoyment of human rights, the sovereignty and the self-determination of peoples and that there is international jurisprudence condemning interference by a State, not to mention private organizations, in the internal affairs of another State and in the lives of its people, the use of nationals of the latter country for that purpose being an aggravating circumstance. Such nationals would not, strictly speaking, be considered mercenaries, but the intention of those recruiting them to use them as mercenaries is objectively undeniable, as is the willingness of such nationals to accept a relationship that turns them into mercenaries. This criterion does not change if a national group organized abroad to oppose the Government of its own country militarily and politically hires and pays nationals or non-nationals based on their military expertise or their expertise in the use of weapons and explosives, to attack the country and its Government. Here too, the intent to employ mercenaries or to turn an individual into a mercenary is obvious. In any case, political opposition to a regime, an activity in which any member of a national community can lawfully engage, must not be confused with the use of

methods which are intrinsically unlawful, the use of mercenaries being one such method.

43. The Special Rapporteur believes that unlawful activities in which a Power which contracts for, prepares and finances a wrongful act against another country uses nationality to disguise the mercenary nature of the act must be analysed and debated with a view to revising current international provisions on the subject. Since the General Assembly and the Member States have repeatedly condemned mercenary activities and since some countries have national laws making mercenarism a crime, it can be argued, where international norms are lacking or incomplete, that a customary international law exists which rejects, condemns and prohibits mercenary activities, based on the nature of the acts rather than on the fact that the perpetrator's nationality is different from that of the country in which he engages in such activities.

B. Current international legislation and its limitations

44. The Special Rapporteur considers it necessary, in this part of his report to the General Assembly, to update his analysis and conclusions concerning the current state of international legislation on mercenary activities. This topic was addressed in previous reports, but requires updating because the international community needs to look into the possible connection that may exist between the persistence of mercenary activities and the egregious gaps in the international legislation currently in force. What is more, the fact that mercenary activity is increasingly hiding behind modern private security companies may be attributable to the failure of existing international legislation to envisage the kinds of situations that involve the presence of mercenaries.

45. In the Special Rapporteur's experience, the topic calls for a review as outlined below. Issues on which the relevant United Nations organs should take a position include: the status of an alien who enters a country and acquires its nationality to conceal the fact that he is a mercenary in the service of a third State or of the other side in an armed conflict; the status of a non-resident national who is paid by a third State to carry out unlawful activities against his country of origin; the status of a dual national, one of whose nationalities is that of the State against which he is acting, who is being paid by the State of his other nationality or by a third State; lastly the limits of *jus sanguinis* in an armed conflict when it is invoked by persons who are paid and sent to fight in an internal or international armed conflict taking place in the country of their ancestors. These questions are not purely casuistic. The Special Rapporteur's earlier reports contain specific references to situations such as those just described and, even though the evidence pointed to the existence of mercenary activities, legal deficiencies and gaps made it difficult to characterize the act and the person committing it correctly.

46. The General Assembly has pointed to the need to review and update the proposals which must be used to enhance the effectiveness of condemnations of mercenaries. Furthermore, earlier General Assembly resolutions recommended that expert meetings be held to study the question of mercenaries in greater depth and come up with proposals for greater legal clarity with regard to the prevention and punishment of mercenary activities. Such meetings have not been held, but perhaps the time has come to schedule them. It would in fact be appropriate to adopt a unified position which not only condemns mercenary activities but also proposes effective legal norms for preventing and punishing them, whatever form they take. Formal condemnations of mercenarism have not succeeded in preventing recourse to mercenaries, or to companies of dubious legality and legitimacy.

47. An analysis of the factors which serve to perpetuate the phenomenon must look into the problems caused by gaps in existing international legislation and into the flexibility in characterizing a person as a mercenary. The persistence of mercenary activities, the tremendous variety of methods by which mercenaries operate and the support networks and organizations hidden behind these activities show that States, particularly the smallest and weakest ones, are not adequately protected against mercenarism and its various forms. There are international legal instruments which condemn mercenarism, but their definition and characterization of it are flawed, that is, they contain gaps, imprecisions, technical defects and obsolete terms that lend themselves to overly broad interpretation. An individual who really was, in practice, a mercenary could, for instance, invoke some of these flawed legal criteria to avoid being characterized as such.

48. Article 47 of Protocol I Additional to the Geneva Conventions of 1949 is the only universal international provision in force which contains a definition of "mercenary": paragraph 1 punishes the mercenary by excluding him from the category of combatant or prisoner of war, which amounts to condemning him for his participation in armed conflicts, and paragraph 2 gives the actual definition. A first point to emphasize is that, because of its placement and content, article 47 of the Protocol does not legislate on mercenarism, but simply limits itself, from

the standpoint of international humanitarian law, to providing for the possibility of mercenarism and defining the legal status of the mercenary if he takes part in an armed conflict. It does not develop the concept legally, hence the above-mentioned gaps.

49. In addition, the definition of mercenary contained in article 47 refers to the elements which must be present in order to determine who is or is not a mercenary. Given the variety and complexity of the armed conflicts of the past three decades, however, invoking this provision has not always been helpful in arriving at an appropriate definition of mercenary activities.

50. According to the information provided directly to the Special Rapporteur by Governments, the laws of most countries do not punish mercenarism as a criminal offence. Although it has been nine years since the International Convention against the Recruitment, Use, Financing and Training of Mercenaries was adopted by the General Assembly, it still has not entered into force, as only 16 countries have ratified or acceded to it. Moreover, while its provisions as a whole represent a measure of progress towards the eradication of this reprehensible activity, it should be noted that article 1, paragraph 1, reproduces almost word for word the definition of mercenary contained in article 47 of Additional Protocol I; while paragraph 2 refers to mercenary violence against the constitutional order or territorial integrity of a State. Thus, no progress has been made towards a better and simpler definition of the concept of mercenary which would allow quicker and more direct action to be taken against mercenary activities.

51. While the relevant international legislation has gaps and limitations, the African countries enjoy better legal protection, thanks to the Convention for the Elimination of Mercenarism in Africa, which was adopted by OAU at its 1977 meeting in Libreville and entered into force in 1985. But "better legal protection" does not mean full protection against all the forms which mercenary activity can currently take. Although the Convention is more comprehensive than article 47 of Additional Protocol I, it does not differ much from it as far as the definition of mercenary is concerned and it lends itself to different and possibly conflicting interpretations in cases where it is States themselves, on the initiative of their Governments, that hire private firms to provide services connected with public order and security.

52. Legislation in this area is clearly inadequate, and allowing this situation to continue prolongs the risks and threats to the self-determination of peoples and their enjoyment of human rights. It is precisely the existence of loopholes and legal ambiguities that has facilitated the use of mercenaries and of companies engaged in mercenary activities, without any effective legal action being taken against those who hire mercenaries or against mercenaries themselves.

53. In the light of the foregoing, the Special Rapporteur maintains that the relevant international legal instruments are but imperfect tools for dealing with the issue of mercenaries. It is difficult to apply article 47 of Protocol I Additional to the 1949 Geneva Conventions in a wide range of cases involving mercenary activities: in many countries, mercenarism is not classified as a crime under domestic law; and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries has yet to enter into force. This puts the international community in a situation where consideration of the issue should also include the need to review and update international legislation on mercenary activities.

C. Terrorism and mercenary activities

54. The Special Rapporteur has dealt with this issue in several reports. This is inevitable, since the material connection between the activities of mercenaries and their involvement in terrorist acts is amply demonstrated by the many cases of terrorist attacks in which it was found that the act was perpetrated by one or more mercenaries hired to commit the crime.

55. In paragraph 116 of his report to the Commission on Human Rights (E/CN.4/1997/24), the Special Rapporteur stated that:

> "Various forms of terrorist attacks are carried out by highly specialized criminal agents who are hired to blow up aircraft, mine ports, destroy buildings and industrial complexes, assassinate and kidnap persons, etc. While in many cases the terrorist agent comes from fanatic groups espousing extremist ideologies, it must be remembered that terrorism is also a criminal activity in which mercenaries participate in exchange for payment, disregarding the most basic considerations of respect for human life and a country's legal order and security".

56. In conjunction with this conclusion, the recommendation in paragraph 125 of the same report stated that:

"The international community must take into account the connection existing between terrorism and mercenary activities and the participation of mercenaries in criminal acts of a terrorist nature. It is suggested that commissions and working and study groups for the prevention and punishment of terrorism should be recommended to include mercenary activities in their analyses and conclusions".

57. At a time when the Secretary-General has advocated the convening of an international conference on terrorism and when the whole world is recoiling in horror at the terrorist attacks in Nairobi, Dar es Salaam and Cape Town, with more than 250 people dead or missing, the Special Rapporteur considers it essential to update existing studies on the connections between the occurrence of terrorist attacks and the presence of mercenaries as the material agents of those attacks. To ignore these possible links or to apply different yardsticks to the two phenomena, arguing that the motivation is different, would be a serious mistake and would weaken terrorism prevention efforts.

58. It is well known that mercenaries become involved in armed conflicts because of their military expertise and that they are highly paid for doing so. However, it is also well known that, since many mercenaries are experts in the use of explosives and technical devices that cause material destruction, they are often hired to carry out deadly attacks that cause collective fear and terror, i.e., indiscriminate terror. As a result, although a mercenary may not be involved in developing extremist ideologies that justify the use of terror as a method of intimidation to attain their goals, he becomes a terrorist when, in return for payment, he agrees to become the instrument of terror and carries out, with appalling efficiency, acts which cause death and destruction. A mercenary can, without ceasing to be a mercenary, also become a terrorist.

59. There is no evidence that extremist organizations, which cultivate fundamentalist ideologies and whose network of revenge and hatred causes them to preach the destruction of whatever stands in their way, use only their own fanatical members to carry out acts that sow widespread terror. In their search for a morally reprehensible "efficiency", they may resort to hiring explosives experts or experts in the technical planning of terrorist attacks who, in return for considerable sums of money, agree to become mercenaries.

60. Political, racial, religious or other extremist organizations which have explicitly acknowledged their terrorist criminal practices attract people of different nationalities. The possibility that some of their members or associates may be mercenaries must be considered. The Special Rapporteur therefore reiterates to the General Assembly its recommendation that this question be studied carefully and in depth.

V. Private security companies and mercenary activities

61. For the past three years, the Special Rapporteur has included in his analysis the issue of private companies operating in the international market which offer security services and advice on military matters, involving themselves in issues related to self-determination of peoples, State sovereignty and national and international guarantees for the enjoyment of human rights. The Special Rapporteur's reports have focused on the fact that these companies view security as just another commodity, subject to the laws of the market, and have no compunction about replacing the State in its security and law and order functions, in exchange for juicy contracts and a share in economic, mining and petroleum operations and a variety of services in the hiring country.

62. The report which the Special Rapporteur submitted to the Commission on Human Rights at its fifty-fourth session (E/CN.4/1998/31 and Add.1) contained a full discussion of this issue and of its serious implications for the enjoyment of human rights and for respect for the self-determination of peoples. In the months since then, nothing new has happened to alter the views expressed in the report. The Special Rapporteur therefore stands by his conclusions, while stressing that he is pursuing his study of all aspects of the issue and updating the available information with a view to proposing concrete measures.

63. The Special Rapporteur wishes to make it clear that, despite the importance of the issue and the threat which these companies pose to the effective sovereignty of States, the political stability of elected Governments and international peace, individual States and international organizations have yet to mount an appropriate response that would halt the growth of these companies and their presence in an increasing number of countries. The most visible reaction so far has come from South Africa, whose Parliament recently enacted a law regulating military assistance to other countries. The law, which entered into force in 1998, includes provisions applicable to the competence of such companies based on the rules for authorizing the export of arms and military equipment, and provides for a maximum prison term of 10 years and a maximum fine of 1 million rand for South African citizens or foreigners residing in

South Africa who participate in military missions abroad without the authorization of the Government of South Africa. The law also limits, but does not prohibit, the broad discretionary powers in military matters that these companies enjoy and which open the door to mercenary involvement.

64. In order to study the structure and functioning of such companies in greater depth, the Special Rapporteur will visit the United Kingdom, where some of these companies are legally registered and formally comply with the legal restrictions imposed on them within British territory. His visit to London to study these companies at first hand, contact the British authorities who are closely monitoring their activities and interview academics and experts on the subject will give him a clearer idea of their nature and activities and the threat which they pose. His next reports to the Commission on Human Rights and the General Assembly will describe the outcome of his visit and make the relevant recommendations.

VI. Current status of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries

65. By resolution 44/34 of 4 December 1989, the General Assembly adopted the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. Pursuant to its article 19, the International Convention is to enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General. At the time of drafting this report only 16 States had completed the process of expressing their willingness to be bound by the International Convention: Azerbaijan, Barbados, Belarus, Cameroon, Cyprus, Georgia, Italy, Maldives, Mauritania, Saudi Arabia, Seychelles, Suriname, Togo, Turkmenistan, Ukraine and Uzbekistan. The following 10 States have signed but not yet ratified the Convention: Angola, Congo, Democratic Republic of the Congo, Germany, Morocco, Nigeria, Poland, Romania, Uruguay and Yugoslavia.

66. The International Convention confirms the legal nature of the resolutions and declarations of United Nations organs condemning mercenary activities and expands international regulation in this area, at present limited mainly to article 47 of the 1977 Protocol I Additional to the Geneva Conventions of 1949 and the 1977 OAU Convention for the Elimination of Mercenarism in Africa. The entry into force of the International Convention will help to characterize situations involving mercenaries more accurately, prosecute and punish offenders effectively, determine jurisdiction clearly in each case and facilitate extradition procedures and preventive cooperation among States.

VII. Conclusions

67. The United Nations has condemned mercenary activities because they have been used to undermine the exercise of the right to self-determination of peoples and the enjoyment of human rights. Whatever form they take, mercenary activities are always unlawful and usually cause serious harm to the populations and territories that have to endure them.

68. Because it is linked to destructive activity and to the devastation caused by military action, as well as to the payment that is required in order for it to be carried out, mercenary activity is intrinsically illegal and immoral; it is usually undeterred by any humane considerations or legal restrictions. Consequently, any task or action prohibited by local or international law can be entrusted to a mercenary, since mercenaries do not consider themselves bound even by the usage and customs of war or by the rules developed over the centuries to make, to the extent possible, armed conflicts more humane.

69. The information gathered by the Special Rapporteur confirms that mercenary activity has not abated. On the contrary, it has diversified and its operating methods have been modernized.

70. Although the African continent still suffers the most from mercenary activities, mercenaries have also been active in other continents, where they have been involved in, *inter alia*, terrorist attacks and illicit trafficking. The present report therefore includes a discussion of the complaint brought by the Government of Cuba, currently under investigation, regarding attacks carried out by mercenaries, acting for third parties, to cause chaos and political destabilization in that country.

71. The international norms relating to mercenaries are not sufficient to combat the growth of the phenomenon and contain gaps and ambiguities which detract from their legal efficacy when they come to be applied. A systematic review should be conducted to clarify the scope of the definition of mercenary, elaborate on the concept and take into account new forms of mercenary activity.

72. In the domestic legislation of most States, mercenarism is not classified as a crime in its own right. This omission

may facilitate the use of the territory of the State to recruit, train and finance mercenaries. Furthermore, no provision is usually made for the extradition of mercenaries, and this makes it easier for them to commit crimes with impunity.

73. Further studies should be conducted on the concept of terrorism as an ideology and a methodology of destructive actions which use terror as a means to an end, and on its link with mercenarism as an effective means of achieving the desired result through terrorist attacks. Terrorists are not always members of fanatical groups. Such groups may resort to the use of mercenaries because the latter's expertise and the pay they receive prompt them to undertake different kinds of criminal activity, without any regard for the most elementary considerations of respect for human life, or for a country's public order, domestic law and security.

74. In recent years, there has been a proliferation of companies specializing in the international supply of military advice and training and security services, in exchange for money and a share in the exploitation of natural resources, the operation of services and other activities. In carrying out their operations, these companies do not hesitate to hire mercenaries to take charge of the military aspects. Because of the very nature and scope of their activities and the methods they use, they tend to undermine the self-determination of the peoples in whose territories they operate and interfere in the internal affairs of States. The legality of their actions in such cases is questionable, even when they are operating under contracts signed with the Government of the country concerned.

75. The fact that such companies are now so widely used substantially alters the concept of security thus far applied by the international community, as well as the responsibility which each State bears for being responsive and safeguarding, with its police force, the exercise by each individual of his or her rights and freedoms as a citizen.

76. The persistence and growth of these companies that offer security services internationally is directly related to the tolerance thus far exhibited, both in the international system and in individual States, in allowing responsibility for settling internal armed conflicts and for ensuring governance in countries with problems to be transferred to these private companies.

77. Given this tolerance, one might expect permissiveness towards the operations of private security and military advice and assistance companies to be accompanied by a change in the way in which mercenaries are perceived, meaning that their activities are not necessarily seen in a negative light and that they are not necessarily viewed as criminals. However, there are countries, most recently, South Africa, which have adopted laws restricting and regulating the activities of these companies in order to avoid any tolerance of mercenary activities.

78. Although nine years have elapsed since its adoption by the General Assembly, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries has been ratified by only 16 States. The delay in its entry into force is helping to perpetuate this criminal activity.

VIII. Recommendations

79. The Special Rapporteur recommends to the General Assembly that it reiterate its condemnation of mercenary activities, whatever form they take, and that it request all Member States to include in their domestic criminal legislation express provisions characterizing mercenarism as a criminal offence and to prohibit the use of their territory for the recruitment, training, assembly, transit, financing and use of mercenaries.

80. Mercenary activities should be dealt with in the same way as all their component parts and methods, i.e., as prosecutable unlawful acts and continuing offences. The same approach should be taken in reviewing and updating the international legislation on mercenaries.

81. The delay in the entry into force of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries is facilitating mercenary activities and the development of a new *modus operandi*. It is recommended that the General Assembly appeal to the understanding of Member States to ratify or accede to the Convention as soon as possible so that it can enter into force.

82. The General Assembly should bear in mind the need to look into the links that may exist between terrorism and mercenarism and, in this context, should recommend to Member States that they investigate the possibility of mercenary involvement whenever criminal acts of a terrorist nature occur. Commissions and working and study groups for the prevention and punishment of terrorism should include mercenary activities in their analyses, conclusions and recommendations.

83. The Special Rapporteur considers it necessary to recommend to the General Assembly that it provide for increased scrutiny, monitoring and evaluation of private companies that offer security and military advice and assistance services on the international market, even when such services have been agreed with legitimate or constitutional Governments or for the purpose of reinstating

them. Since these companies usually hire mercenaries to provide the military component of their services, attention must be paid to the need to regulate and restrict their operations to prevent them from interfering in internal affairs to the point of taking over responsibility for aspects, such as security and public order, that are the sole responsibility and obligation of the State, which must retain full control over the forces of law and order.

84. Given the growing trend towards hiring private companies to take over law and order functions which should be the sole preserve of States, the Special Rapporteur wishes to recommend to the General Assembly that it authorize the conduct of studies and the drafting of proposals for strengthening international prevention, action and response mechanisms in all cases where there is a serious threat to the enjoyment of human rights, the exercise of the right to self-determination of peoples, internal law and order, life and peace, particularly in situations of internal armed conflict which could extend beyond national boundaries or have regional repercussions. This would limit the activities of private security and military assistance companies strictly to providing technical and professional advisory services in accordance with the relevant legal norms.